No. 87-6116

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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On Behalf of Amicus Curiae,
National Association of
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QUESTION PRESENTED

WHEN A STATE APPELLATE COURT DETERMINES THAT AN INDIGENT CRIMINAL DEFENDANT'S APPEAL RAISES ARGUABLE ISSUES, MUST THE COURT PROVIDE THE DEFENDANT WITH COUNSEL TO BRIEF AND ARGUE HIS OR HER APPEAL, OR MAY THE APPELLATE COURT DECIDE THE MERITS WITHOUT APPELLATE ADVOCACY ON BEHALF OF THE DEFENDANT?

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers. NACDL was founded over twenty-five years ago to advance the

knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of these objectives, and of the criminal justice system, is the protection of an individual's constitutional right to counsel.

The decision of the Ohio Court of Appeals presents a threat to the right of counsel. This Brief supports the Petitioner's argument that the decision below should be reversed and petitioner provided with counsel to pursue a fresh appeal of his criminal conviction.

Both parties have consented to the filing of this Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The Ohio appellate court should have provided counsel to Penson once it recognized his arguments on appeal were not frivolous. Appellate advocacy plays an essential role in appellate adjudication. Legal philosophers leave no doubt that the briefs and arguments of appellate lawyers contribute to the integrity of the process. When the court below chose to decide the merits of Penson's case without the benefit of counsel it violated Anders v. California, 386 U.S. 738 (1967) and its own duty to have utilized an adversarial system designed to insure wisdom and integrity in the appellate process.

ARGUMENT

THE OHIO COURTS' FAILURE TO PROVIDE PETITIONER WITH THE ASSISTANCE OF COUNSEL ON APPEAL VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Anders v. California, 386 U.S. 738,744 (1967) permitted an appellate court, faced with counsel's submission that no arguments supported reversal, to fully examine all the proceedings and to decide whether the appeal is frivolous. The Court wrote:

> If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

In this case the Ohio Court of Appeals examined the record and rejected the "Anders brief" submitted by Penson's counsel:

> Initially, this court is troubled by the filing of an Anders brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants Brooks and Smith's counsel in their respective appeals.
>
> J.App. 40-41.

The Ohio court then proceeded to decide Penson's case based upon its affirmances of his co-defendants' cases, saying its thorough consideration of their claims meant that Penson "suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." J.App. 40-41.

Simply put, Penson did not have appellate counsel, and the Ohio court decided his case without written or oral advocacy on his behalf. The plain language of Anders required that advocacy once the court recognized Penson's appeal was not frivolous.

Following Anders would have protected Penson. It also would have protected the integrity of the process of appellate decisionmaking. This Brief brings to the Court's attention a brief sampling of the views of respected writers who have spoken about the important role an appellate advocate plays in assisting proper appellate decisionmaking. Their comments support the conclusion that providing counsel in arguable cases serves both the Constitution and the courts.1/

1/ Appellate advocacy literature is extensive, and while there are differing views on the importance of oral argument,
(continued next page)

John W. Davis spoke strongly of advocacy's importance:

> Says Lord Coke, "No man alone with all his uttermost labors, nor all the actions in them, themselves by themselves out of a court of justice can attain unto a right decision; nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right.

Davis, The Argument on Appeal, 20 A.B.A. Journal 895,896 (1940). In this case there was neither written nor oral advocacy for Penson. A court should not have to forge its own tools:

1/ (continued from prior page)
no commentators disagree about the critical nature of a brief on appeal. Two articles which offer insights into the oral advocacy question also provide a helpful compilation of the literature. Martineau, The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom, 72 Iowa L.Rev. 1 (1986) and Bright, The Power of the Spoken Word: In Defense of Oral Argument, id., at 35.

> [Courts] are anxiously waiting to be supplied with what Mr. Justice Holmes called "the implements of decision." These by your presence you profess yourself ready to furnish.
>
> Id.

Judge Aldisert concurred forty years later:

> Although appellate court decisions are the work product of a collegial body, the primary tools for making and justifying the decisions are the briefs submitted by the lawyers. The basic distinction between professional responsibility in the two systems [common law and civil law] is that, in the common law tradition, the chief responsibility falls on the lawyers; in the civil law tradition, it falls on the judges.
>
> Aldisert, The Appellate Bar: Professional Responsibility and Professional Competence--A View From the Jaundiced Eye of One Appellate Judge, Capital Univ. L.Rev. 445, 455 (1982).

The common law's reliance on counsel was one of the subjects of Karl Llewellyn's The Common Law Tradition, Deciding Appeals (1960):

> The American appellate judicial tribunal moves into its deciding only after argument by trained counsel--argument always written and mostly oral as well. If the explicit issue-drawing directs, narrows, sharpens the deciding process; if limitation of available "fact"--material by the trial record renders the deciding an operation bounded and semitraceable, and insofar more reckonable and testable, by way of its fact foundation; then the regime of argument renders the deciding also a process oriented partly from without by analysis, by arrangement of data, and by persuasions: oriented, however, not by judicially-minded helpful consultants but by adversaries to each of whom the tribunal serves either as an obstacle or as a tool, or, more commonly, as both at once.

Id., at 29-30. Llewellyn continues:

> What is clear is that if counsel's business has been properly done, the very pleadings have in quiet factuality "made the stones speak" and the reason sing--to this court.
>
> Ibid., at 232.

No one spoke or sung to the Ohio Court of Appeals on behalf of Steven Penson. By its own admission that court acknowledged the room for doubt in Penson's case. Stare decicis did not demand a complete rejection of his claims as devoid of merit; the court needed to judge, it needed to match the facts of Penson's record to the law--a delicate task:

> It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him.
>
> Cardozo, The Nature of The Judicial Process (1921), p.21.

Penson was the litigant before the court. The court decided that Penson's counsel had not provided them with the assistance necessary to hear and decide his appeal. From a judging standpoint the question is not whether that failure was harmful to Penson; it is whether that failure affected the integrity of the judicial process. No one can seriously suggest that appellate judicial decision-making, sans argument of counsel presents an effective model.

Rejecting the Ohio court's attempt to dispense with counsel in a non-frivolous case will protect the integrity of the appellate process in indigent criminal appeals, will protect the appellate rights of indigent criminal defendants, and will also serve the interests of judicial efficiency. If an appellate court rejects an Anders brief, undertakes its own

"representation" to decide the case on the merits, and then must justify its actions under a harmless error analysis and an ineffective assistance of counsel standard, a simple appeal has become a complicated constitutional case.

Common sense condemns that result. Law and logic compel the conclusion we urge: when an appellate court finds that an Anders brief was not justified it should appoint counsel who will submit an advocate's brief (and argument if appropriate) on the appellant's behalf. Anders required that much; an appreciation of the principles of appellate advocacy suggests nothing less will suffice.

CONCLUSION

For the foregoing reasons the decision below should be reversed. This case should be remanded to the Ohio Court of

Appeals with directions to that Court to reinstate the case so that Steven Penson may be represented by counsel on his appeal.

Respectfully submitted,

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On Behalf of Amicus Curiae,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing "Amicus Curiae Brief of the National Association of Criminal Defense Lawyers in Support of the Petitioner" have been furnished by U.S.Mail to (1) MARK B. ROBINETTE, Special Assistant Prosecuting Attorney, 20 E. Tabb Street, Suite 101, Petersburg, Virginia 23803, Counsel for Respondent, and (2) GREGORY L. AYERS, Chief Counsel, Ohio Public Defender Commission, Eight East Long Street, 11th Floor, Columbus, Ohio 43266-0587, Counsel for Petitioner, on this 21 day of April, 1988.

BRUCE S. ROGOW

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